

MAJLIS PEGUAM MALAYSIA v. CHOU KA PING

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COURT OF APPEAL, PUTRAJAYA
 ABDUL WAHAB PATAIL JCA
 HAMID SULTAN ABU BACKER JCA
 UMI KALTHUM ABDUL MAJID JCA
 [CIVIL APPEAL NO J-02-2368-10-2013]
 4 MARCH 2015

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LEGAL PROFESSION: *Disciplinary proceedings – Disciplinary Committee – Whether properly constituted – Whether coram failure rendered report to Disciplinary Board nullity – Whether coram failure curable by endorsement of report – Legal Profession Act 1976, s. 103D(1) & (2)*

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LEGAL PROFESSION: *Disciplinary proceedings – Disciplinary Committee – Failure of coram – Whether to be re-heard before properly constituted Disciplinary Committee – Lapse of nine years pending disposal of appeal – Whether court should exercise discretion to allow rehearing before newly-constituted Disciplinary Committee*

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The appeal was against the decision of the High Court in allowing the respondent's appeal against the decision of the Advocates and Solicitors Disciplinary Board ('DB') which ordered the respondent to be suspended from practice as an advocate and solicitor for a period of three years. The decision of the DB appealed against was made under s. 103D(1) of the Legal Profession Act 1976 ('LPA') upon consideration of the report by the Disciplinary Committee ('DC') on the complaint of misconduct against the respondent. Only two members attended the hearing and investigation of the DC when in law the DC must comprise of three members. As such the Judicial Commissioner ('JC') held that the DC was improperly constituted and in breach of the LPA which was not curable by endorsement of the report by all three members. The coram failure at the stage of the hearing by the DC, was fatal to the entire proceedings of the DC which rendered a nullity, inclusive of its findings and recommendations to the DB. Further, the JC held that the failure by the DC to record evidence and proceeding was an error of law in the decision making process which also rendered the report of the DC to the DB a nullity and the order of the DB based on the report was accordingly nullified and invalidated. In the appeal, the issue raised by the appellant was whether the JC, in quashing the decision of the DB, should have sent back the matter to be re-heard before a properly constituted DC.

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Held (dismissing appeal with no order as to costs)

Per Umi Kalthum Abdul Majid JCA delivering the judgment of the court:

(1) Although the alleged misconduct was very serious in nature, the issue herein was whether to send the matter back to be heard before a properly constituted DC. About nine years had lapsed pending the disposal of the appeal and even though the respondent had continued her practice, the

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A Sword of Damocles had been hovering over her head for the nine years. Despite the respondent having taken objection to the fact of coram failure, the DC nevertheless proceeded. The court therefore declined to exercise the discretion to have the matter re-heard before another newly constituted DC. (para 14)

B *Bahasa Malaysia Translation Of Headnotes*

Rayuan ini adalah terhadap keputusan Mahkamah Tinggi dalam membenarkan rayuan responden terhadap keputusan Lembaga Disiplin Peguambela dan Peguamcara ('DB') yang memerintahkan supaya responden digantung daripada beramal sebagai peguambela dan peguamcara bagi tempoh tiga tahun. Keputusan DB yang dirayukan dibuat di bawah s. 103D(1) Akta Profesion Undang-Undang 1976 ('Akta') selepas mempertimbangkan laporan Jawatankuasa Disiplin ('DC') atas aduan salah laku yang dibuat terhadap responden. Hanya dua orang ahli yang menghadiri pendengaran dan siasatan DC sedangkan dari segi undang-undang DC harus terdiri daripada tiga orang ahli. Oleh itu, Pesuruhjaya Kehakiman ('PK') telah memutuskan bahawa DC tidak dibentuk sewajarnya dan melanggar Akta, yang tidak boleh diperbetulkan dengan endorsmen pada laporan oleh tiga orang ahli. Kegagalan kuorum di peringkat pendengaran DC menjejaskan keseluruhan prosiding DC yang, oleh itu, menjadikannya batal, termasuk dapatan-dapatan dan cadangan-cadangannya kepada DB. Selanjutnya, PK memutuskan bahawa kegagalan DC merekodkan keterangan dan prosiding adalah salah di sisi undang-undang dalam proses pembuatan keputusan yang turut menjadikan laporan DC kepada DB batal dan perintah DB berdasarkan laporan tersebut oleh itu adalah batal dan tidak sah. Dalam rayuan, isu yang dibangkitkan oleh perayu adalah sama ada PK, dalam membatalkan keputusan DB, sepatutnya menghantar semula perkara tersebut untuk pendengaran semula di hadapan DC yang dibentuk secara sewajarnya.

Diputuskan (menolak rayuan tanpa perintah untuk kos)

Oleh Umi Kalthum Abdul Majid HMR menyampaikan penghakiman mahkamah:

G (1) Walaupun salah laku yang didakwa adalah bersifat serius, isu adalah sama ada perkara tersebut perlu dihantar semula kepada DC yang dibentuk dengan sewajarnya. Lebih kurang sembilan tahun telah berlalu sementara menunggu pemutusan rayuan dan walaupun responden telah meneruskan amalan guamannya, ancaman terhadapnya masih berlegar selama sembilan tahun. Walaupun responden telah membuat bantahan terhadap fakta kegagalan kuorum, DC masih meneruskan pendengaran. Mahkamah oleh itu enggan melaksanakan budi bicaranya untuk perkara tersebut didengar semula di hadapan DC yang dibentuk semula.

I **Case(s) referred to:**

Gurbachan Singh Bagawan Singh & Anor v. Vellamy Pennusamy & Ors And Other Application [2012] 2 CLJ 663 FC (refd)

Legislation referred to:

Legal Profession Act 1976, 94(2), 94(3)(n), (o), 103A(2), 103D(1), 103E(1)
Legal Profession (Disciplinary Proceedings) (Investigating Tribunal And
Disciplinary Committee) Rules 1994, rr. 24, 26

For the appellant/intervener - Saha Deva (Ajeed Kaur with him); M/s Saha & Assocs
For the respondent - T Gunaseelan (Y Rajadevan with him); M/s Gunaseelan & Assocs
For the disciplinary board - Wong Kim Fatt (Wong Boon Chong with him); M/s Gulam
& Wong

[Appeal from High Court, Johor Bahru; Originating Motion No: 25-16-2010 (MT5)]

Reported by S Barathi

JUDGMENT**Umi Kalthum Abdul Majid JCA:**

[1] This is an appeal against the decision of the High Court dated 23 September 2013 in allowing the respondent's appeal against the decision of the advocates and solicitors disciplinary board ("DB") dated 5 February 2010, in which the respondent was to be suspended from practice as an advocate and solicitor of the High Court of Malaya for a period of three years. The suspension order was to take effect 21 days from the date of the order and was to expire on 26 February 2013.

Brief Facts

[2] The brief facts of the case are as follows:

- (i) The appellant is an advocate and solicitor of the High Court in Malaya and practising under the name Messrs Chou & Co;
- (ii) The complainant (who was the respondent in the High Court appeal and not a party to this appeal) lodged a complaint dated 12 September 2005 to the DB that the respondent had acted in a loan transfer which later turned into a fraudulent sale and purchase transaction. The complainant in her complaint letter dated 12 September 2005, stated that she was approached by a "runner" called Mike who told her that he could arrange for a fast loan and the respondent would be the lawyer who would prepare the documents for that purpose;
- (iii) According to the complainant the runner influenced her to meet the respondent on 16 March 2004. The complainant and her sister were then persuaded to sign blank papers in escrow. The complainant was later given a cheque of RM17,000 from the loan of RM20,000, the sum of RM3,000 being for interest and expenses. The complainant then stated that on 5 August 2004 the runner went to her house and

- A delivered two undated letters purportedly signed by the complainant and addressed to the respondent's legal firm, Messrs Chou & Co, which was witnessed by Lim Hock Chai (Mike) the runner;
- (iv) The complainant further stated that the documents stated that the complainant had received RM10,000 deposit and RM102,750 and
- B that the buyer, Chew Siew Lee had settled the purchase price in full. The complainant had described the purchaser as "accomplice";
- (v) In the letter of complaint, the complainant further stated that on 16 March 2004 the complainant and her sister were again taken by
- C the runner to the respondent's office where she was again induced to sign escrow papers being a letter addressed to Messrs Tea, Kelvin Kang & Co, legal firm which had acted for the complainant when she purchased the property, to authorise Messrs Chou & Co to collect the title document from the Land Office;
- (vi) The complainant in para. 8 of her letter of complaint said that it took her three months to gather the sum of RM25,000 (RM17,000 principal and RM8,000 interest) to repay the loan and to collect the papers she had signed in escrow. The complainant stated that in the meantime the respondent wrote to Messrs Tea, Kelvin Kang & Co informing them that the property had been sold;
- E (vii) The complainant further stated that the runner dropped in her letter box, four bank-in slips to show that the runner had purchased the property. When she attempted to return the sum of RM63,000 to the runner, the runner refused and said he had bought the property;
- F (viii) The complainant lodged a police report. The exhibits tendered by the complainant with the letter of complaint showed that there was indeed a sale and purchase agreement;
- (ix) The respondent responded to the DB letter dated 6 October 2005. In his letter of explanation the respondent explained that he had acted for one Madam Chew Siew Lee, the purchaser. The complainant came to his office with a broker on 16 March 2004 for the sale and purchase of a unit of double storey terrace house held under Geran 48196, Lot 12504, Mukim Tebrau District of Johor Bahru ("the property"). The sale and purchase price was RM320,000 and the relevant papers were executed;
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- H (x) According to the respondent, the purchaser wanted to purchase the property in cash. The purchaser paid RM10,000 deposit upon signing the sale and purchase agreement;
- I (xi) The complainant informed the respondent that she had just bought the property and the relevant documents were with M/s Tea, Kelvin Kang & Co. The complainant then signed the letter of authorisation authorising the respondent to collect the original issue document of

- title from her solicitor. All the documents signed by the complainant were explained to her personally and the complainant had willingly signed all the documentation pertaining to the sale and purchase agreement; A
- (xii) The purchaser showed the respondent that the full purchase price was fully paid and showed the respondent evidence of full payment by way of cheques and cash; B
- (xiii) In the respondent's further explanation letter dated 10 November 2005 the respondent said that initially the runner had wanted to buy the property for himself at RM200,000. The price was not agreed by the complainant as it was below market price. That was why the caveat was lodged by the runner. Since there was a private caveat lodged by the runner, the respondent felt that there was no necessity to lodge a private caveat for the purchaser; C
- (xiv) The purchaser then sued the complainant *vide* Johor Sessions Court Summons No. 52-7416-2004 (2). The suit was filed to compel the complainant to hand over the vacant possession of the property; D
- (xv) The complainant filed the defence and a counterclaim against the purchaser; E
- (xvi) On 26 April 2006, pursuant to an application for summary judgment, the Sessions Court ordered the complainant to deliver vacant possession to the purchaser; E
- (xvii) The complainant then sued the respondent, the vendor, Lim Hock Chai (the runner) and Lyva Trading, in the Johor Bahru High Court *vide* Suit No. 22-60-2005. The suit by the complainant, was dismissed by the High Court; F
- (xviii) The Investigation Tribunal in its findings of fact dated 5 December 2006 recommended that disciplinary committee ("DC") to carry out a formal investigation; G
- (xix) The DC conducted the investigation and in its report stated that:
- (a) The complainant although she knew she was entering into loan transaction for a small sum but all oral and documentary evidence showed that she had no intention to enter into a sale and purchase agreement and sell her property to a third party; H
- (b) The whole transaction would not have been possible and completed if the respondent as solicitor did not actively participate in the preparation of the purported sale and purchase agreement and the transfer form (14A) resulting in the complainant being deprived of her property which was wrongly transferred to a third party. The fact was that the role of the respondent was instrumental in the complainant losing her property; I

- A (c) The conduct, the active involvement of the respondent solicitor, the unaccepted conveyance practice carried out by the respondent had given rise to misconduct under ss. 94(3)(n) and (o) of the Legal Profession Act 1976 (“LPA”);
- B (xx) The DC in the same report recommended that the respondent be suspended for three years under s. 94(2) of the LPA;
- (xxi) The DB on 5 February 2010 considered the report made by the DC on the complaint against the respondent and ordered the respondent be suspended from practice as an advocate and solicitor for a period of three years and it was further ordered that the suspension was to take effect 21 days from the date of the order to expire on 26 February 2013;
- C (xxii) On appeal before the learned Judicial Commissioner, the respondent submitted that during the hearing before the DC only two members of the committee were present, namely, Mr L Parthiban and Miss Evelyn Chan Siew Yen. The third committee member, En Adi Radlan Bin Abdul Rahman, was not present during the hearing;
- D (xxiii) Despite objection by the respondent’s solicitor Mr Choo Keng Yong that En Adi Radlan bin Abdul Rahman was not present, the other two members proceeded with the hearing;
- E (xxiv) The respondent in the affidavit in support had also stated that, what was referred to as the “the committee’s recommendation”, certified as true copy was incorrect because the hearing was on 13 April 2009 and not 25 February 2009 or 22 May 2009;
- F (xxv) Further in para. 12, affidavit in support, the respondent stated that the committee’s recommendation did not conform with r. 24 Legal Profession (Disciplinary Proceedings) (Investigating Tribunal And Disciplinary Committee) Rules 1994, in that the DC had failed to record any evidence given before the Committee;
- G (xxvi) The respondent in para. 13 had stated that the DC did not comply with r. 26 of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal And Disciplinary Committee) Rules 1994 in not making a finding based on the facts of the case;
- H (xxvii) The respondent in paras. 14 to 19 of the affidavit in support had stated the merits of the case. The disciplinary board did not file any affidavits in reply in respect of the substantive appeal. The complainant in her affidavit in reply did not rebut the respondent’s contention that one member of the DC was not present during the hearing;
- I (xxviii) The respondent filed the originating motion appealing against the DB’s decision dated 5 February 2010 to the High Court, *inter alia*, to set aside the order of the DB made under s. 103D(1) of the LPA. The appeal was pursuant to s. 103E(1) of the LPA.

High Court Decision

[3] The issues before the learned Judicial Commissioner were as follows:

- (i) Whether there was a coram failure on the part of the DC contrary to s. 103A(2) LPA which rendered its findings and recommendation as well as the finding/decision of the DB null and void?
- (ii) Whether the DC had committed an error of law in its decision making process by failing to record the evidence that had been given and notes of its proceedings?
- (iii) Whether the High Court pursuant to s. 103E, LPA should interfere with the findings and order of the DB made against the appellant?

[4] The learned Judicial Commissioner in his analysis found that the decision of the DB appealed against was made under s. 103D(1) of the LPA upon consideration of the report of the DC on the complaint against the respondent. The DC was appointed under s. 103A LPA which stipulates under sub-ss. (2) that it “shall” consist of “(a) two advocates and solicitors; and (b) one lay person, appointed from the disciplinary committee panel”. The word “shall” denotes that this is a mandatory requirement for a properly constituted DC.

[5] It was further found that in the circumstances, the contention of the appellant/intervener that the respondent (Chou Ka Ping) had to produce corroborative evidence of coram failure by reason of the said absence of one of the members of the DC could not be upheld. No notes of proceedings of the DC were tendered to show that all three members were present during the hearing and investigation. It was undisputed that the report of the DC to the DB was signed by all three members. However, on the evidence as it stood, only two members attended the hearing and investigation whereas in law the DC must comprise of three members as stipulated. The DC was thus improperly constituted during its proceedings in breach of the LPA, which was not curable by endorsement of the report by all three members. It must be properly constituted at the material time of carrying out its statutory role of investigating into the complaint during the hearing.

[6] It was further held that the role of making findings in relation to facts was solely within the purview of the DC. Hence, the constitution of the DC in accordance with law was vital. Its findings have far-reaching and penal consequences to the advocate and solicitor complained against. As there was coram failure at the stage of the hearing by the DC, it was fatal to the entire proceedings of the DC which were thus rendered a nullity, inclusive of its findings and recommendations to the DB.

[7] On the issue whether the DC had committed an error of law by not recording evidence and notes of proceedings despite its essential function being to record its findings in relation to facts, it was contended by the

- A respondent, that the findings must necessarily be based on an evaluation of the evidence recorded, without which the DB would not be in a position to discharge its statutory duty of making an order based on the report of the DC. The report of the DC must necessarily mean findings and recommendations together with the evidence recorded that formed the basis of the findings and recommendations. Rule 24 of the Legal Profession (Disciplinary Proceeding) (Investigating Tribunal and Disciplinary Committee) Rules 1994 imposes a duty on the DC to make a record of all the evidence adduced. Failure by the DC to record evidence and proceedings was thus an error of law in the decision making process by the DC. It rendered the report of the DC to the DB a nullity and thereby, the order of the DB based on the DC's report was on this ground too, accordingly, was nullified and invalidated.

- [8] The High Court, therefore, and without going into the facts and substance of the DB's decision on its merits, allowed the respondent's appeal with costs of RM15,000 and set aside the order of the DB. The award of costs was apportioned at RM12,000 jointly and severally against the intervener/ Bar Council and the DB, whilst RM3,000 was to be borne by the complainant/ respondent.

The Appeal

- E [9] Before us, learned counsel for the appellant had abandoned all issues raised, except one, and that was whether the learned Judicial Commissioner, in quashing the decision of the DB, should have sent back the matter to be reheard before a properly constituted DC. In doing so, learned counsel had conceded the fact that the DC which heard the matter at the first instance had suffered from a coram failure.

- F [10] On the effect of coram failure, it was submitted by learned counsel for the appellant that the complaint ought to be heard before a properly constituted DC following the decision in *Gurbachan Singh Bagawan Singh & Anor v. Vellasamy Pennusamy & Ors And Other Applications* [2012] 2 CLJ 663; [2012] 2 MLJ 149 where the Federal Court had ordered that the leave application be heard by a newly constituted panel. It was held at p. 167 of the judgment as follows:

- H [40] Similarly, on the facts of the present case, we hold that there was a breach of s. 74 of the CJA. Section 74 of the CJA clearly provides that every proceeding in the Federal Court 'shall be heard and disposed' by a minimum of three judges. It used the words 'shall be heard and disposed'. Thus, the Federal Court must hear and dispose the matter by a minimum of three judges. In the present case, there was a period where leave applications were heard only by two judges. It was a clear violation of s. 74 of the CJA. There had been a coram failure.

- I [41] In light of the above conclusion, we find it unnecessary to consider the other arguments advanced by both sides. We hold that this is another rare but an appropriate case for the exercise of the inherent power of this court as envisaged in r 137.

[42] For the above reasons, the review applications are allowed. The decision of this court on the leave applications dated 21 April 2010, is set-aside. We make an order that the leave applications be reheard by a newly constituted panel of this court.

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[11] Learned counsel for the appellant had urged this court to exercise its discretion and to allow this appeal and to order that the matter be sent back to be reheard before a properly constituted DC. Learned counsel for the DB had also taken the same stand as the appellant and submitted that the complaint should be heard before a new DC.

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[12] The respondent in reply submitted that there is no provision in the LPA that permits a case to be remitted before a different panel for a fresh hearing. Furthermore, the appeal court should be slow in invoking the inherent jurisdiction to send the complaint for a new hearing as the respondent might be subjected to a double jeopardy.

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[13] The appellant's counsel in reply submitted that there was no double jeopardy involved should the matter be sent back to be reheard as the learned Judicial Commissioner had not decided on the merits of the appeal.

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[14] We had unanimously dismissed this appeal with no order as to costs and ordered the deposit be refunded to the appellant. We did so for the reason that although the alleged misconduct is very serious in nature, the issue now before us is whether to send the matter back to be heard before a properly constituted DC. We noted that the complainant had lodged her complaint on 12 September 2005; the DC issued its report some time in 2009 (the DC report was undated); the DB's decision was on 5 February 2010; this appeal was heard before the High Court and disposed of on 23 September 2013; this appeal before us was heard and disposed of on 1 October 2014. On this issue we must necessarily consider also that even though in the meantime the respondent had continued to practice, the Sword of Damocles had been hovering over her head for about nine years pending the disposal of this appeal, and it eventuated despite the respondent having taken objection to the fact of coram failure, the DC proceeded nevertheless. We refrained from discussing how such conduct may be described or labelled. Taking into account all these considerations, we declined to exercise our discretion to have the matter reheard before another newly constituted DC.

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